

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

76-1313

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of JOHN D'AMELIO,
Contempt Proceeding under Title 28,
United States Code, Section 1826a.

UNITED STATES,

Plaintiff-Appellee,

76-1313

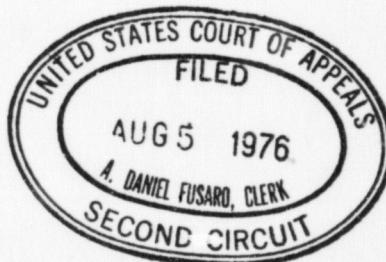
- against -

JOHN D'AMELIO,

Defendant-Appellant.

-----x

PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC BY JOHN D'AMELIO AND
MOTION IN THE ALTERNATIVE FOR A STAY OF
MADATE AND RELEASE ON BAIL, PENDING CER-
TIORARI.



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To the Honorable Circuit Judges Waterman and Meskill,
and District Judge Bratels:

JOHN D'AMELIO, Defendant-Appellant herein, respect-
fully petitions this Court, pursuant to its Rules, for a
rehearing of the determination of this Court, made the
23rd day of July, 1976, which affirmed the judgment of the
United States District Court for the Southern District of
New York, adjudging the Defendant-Appellant in civil con-
tempt, under 28 USC 1826a, after a hearing before Knapp, J.
The Defendant-Appellant is presently incarcerated, since
bail was denied pending appeal.

In the event, that the Bench denies a rehearing, or
the present determination is adhered to following a rehear-

ing, then Defendant-Appellant respectfully requests that this petition be submitted to all of the other Circuit Judges for determination en banc.

The importance of the issues herein involved, double jeopardy, collateral estoppel, due process and supervising power of this Court over the United States Attorney's Office for the Southern District and the District Court, should be heard by the full Court.

BRIEF STATEMENT OF THE CASE.

On November 1, 1973, JOHN D'AMELIO was arrested for conspiring to violate the Federal Narcotic Laws. He was held overnight at West Street and released the next morning at the United States Attorney's Office, at Foley Square, without any charges being proffered against him.

In October, 1975, JOHN D'AMELIO was indicted for conspiring to violate the narcotic laws and three substantive counts involving the distribution and possession of cocaine. The duration of the conspiracy was from September 1, 1973, to the date of the indictment.

The fourth count of the indictment and the third and fourth overt acts, charged in the first count of the indictment, encompass the incident of November 1, 1973, the incident for which the Defendant was arrested and released.

The indictment was tried before the Honorable Inzer B. Wyatt and a jury. The Court dismissed counts two and three, after the Government's case. The jury acquitted JOHN D'AMELIO of the remaining counts on Friday, April 9, 1976.

Before the jury left the courtroom, the Assistant United States Attorney wrote out and handed a subpoena to JOHN D'AMELIO in the courtroom. Said subpoena is the subpoena, pursuant to which JOHN D'AMELIO appeared before the Grand Jury on June 29, 1976.

An order to show cause to quash said subpoena was heard before the Honorable Charles Briat. The Court denied said motion, stating that it was premature since the questions before said Grand Jury had not yet been asked.

On June 29, 1976, JOHN D'AMELIO appeared before said Grand Jury and invoked his fifth amendment privilege. An order granting the witness immunity was signed by the Honorable Whitman Knapp and the witness was advised that he had immunity, and he still refused to testify.

He was then brought before the Honorable Whitman Knapp, without notice, and JOHN D'AMELIO was summarily held in civil contempt.

REASONS FOR GRANTING REHEARING.

1. The Assistant United States Attorney stated before the Honorable Whitman Kanpp, that they wanted to know where JOHN D'AMELIO got the cocaine, which he was acquitted of selling to one William Zacchi. See p. 11 of the transcript.

It is undisputed that, if a man is convicted of a crime, given immunity and asked about details of the crime for which he was convicted, he must testify or be held in contempt.

Piemonte v. United States, 367 U.S. 556. There is only one reported case in which a person was acquitted and later questioned before a Grand Jury. See United States v. Castaldi, 338 F.2d 883 (2d Cir. 1964), rev'd 384 U.S. 886. However, Castaldi is distinguishable in that Castaldi had been acquitted one year before the Grand Jury investigation and the Grand Jury investigation was not about the specific facts of the acquittal, but about narcotics traffic in general. Here, in the instant case, Defendant is asked the source of the narcotics for which he was acquitted of selling.

He is to be in a dilemma if he answers and denies he had narcotics. The Government might indict him for perjury and Defendant would have to raise the defense of collateral estoppel and double jeopardy, or he can refuse to testify and face contempt charges. This treatment of a defendant is very close to double jeopardy and collateral estoppel, which violate the due process clause of the United States Constitution and constitute cruel and inhuman punishment of the Appellant.

It is, alas, a question in this Circuit as to whether the Defendant could be indicted, or convicted in this Circuit if he denied possession and sale of the narcotics he was acquitted of possessing (Tramunti v. United States, 343 F.2d 548 (2d Cir. 1972).

2. As stated in the facts, Defendant was originally arrested in the fall of 1973, released after having been held overnight, and then indicted some two years later. Within seconds of the Defendant's acquittal of said indictments, he was served a subpoena to further litigate the said indictment. There must be at one point an end to litigation in a criminal case. An acquittal should be such an end. I quote Judge Warren's dissent in Piemonte, supra, where he was complaining about a man subpoenaed after conviction, 367 U.S. at 564:

"In my opinion, the Government subjected the petitioner to unjustifiable harassment. The petitioner has been convicted for his admittedly illegal conduct and is presently paying his debt to society for that conduct. However, not being satisfied with this punishment, the Government sought to extract from the petitioner, under the threat of a contempt conviction, testimony which it could not have compelled at the original trial in 1958, and which it knows might well endanger petitioner's life and the lives of his loved ones. In my view, the Government's attempt to compel the petitioner to testify about conduct for which he has already been punished, and the District Court's imposition of an additional term in the penitentiary for petitioner's refusal to testify about such conduct represents the type of harassment which violates the spirit of the Double Jeopardy Clause of the Fifth Amendment. Cf. Abbate v. United States, 359 U.S. 187, 196 (separate opinion of MR. JUSTICE BRENNAN); Ciucci v. Illinois, 356 U.S. 571, 573 (dissenting opinion). I think it can fairly be said that the treatment which the petitioner has received from the Government and the District Court falls far short of that fundamental fair-

ness which the Constitution guarantees and to which even the bases prisoner in the penitentiary is entitled. Therefore, even if the Court is unwilling to recognize that the Constitution prohibits the imposition of punishment in a summary proceeding, it ought to exercise its supervisory power over the lower federal courts to rectify the abuse of the summary contempt power which the record in this case makes manifest. See Offutt v. United States, 348 U.S. 11."

If the Court approves this conduct, it would allow the Government in every acquittal in this district to subpoena the Defendant and question about various aspects of the case. There would be no end to litigation arising out of this procedure.

It is apparent, the reason that there was no prior recorded decisions exactly on point is that the Government has previously thought better of harassing citizens to the extent that has been done in the record at bar.

There is nothing to prevent a vindictive prosecutor from using this method to get even with the Defendant for obtaining an acquittal.

MOTION IN THE ALTERNATIVE FOR STAY
OF MANDATE AND BAIL PENDING CERTIORARI.

In the event, that this petition for rehearing is rejected, or that it is granted, but the original determination is adhered to, then it is respectfully requested that the Mandate herein be stayed and that Appellant, JOHN D'AMELIO, be released on bail in a reasonable amount, pending certiorari.

Under 28 U.S. 1826a, bail can be granted in this situation where a substantial question of law lies. Since there is a substantial question of law and the Defendant-Appellant's background shows that he is a good risk for bail, Defendant-Appellant should be released on bail, pending certiorari.

THE MANDATE, THEREFORE, SHOULD BE STAYED AND BAIL SHOULD BE GRANTED IN A REASONABLE AMOUNT.

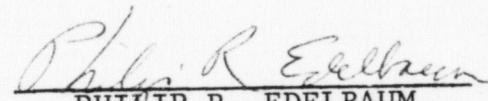
Respectfully submitted,

Philip R. Edelbaum
PHILIP R. EDELBAUM
Attorney for Defendant-
Appellant, JOHN D'AMELIO

CERTIFICATION OF GOOD FAITH

I, PHILIP R. EDELBAUM, an attorney-at-law and member of the Bar of this Court, certify that this Petition for Rehearing and Motion in the Alternative for Stay of Mandate and fixation of bail of JOHN D'AMALIO, pending certiorari, is submitted in good faith and not for the purpose of delay.

August 5, 1976


Philip R. Edelbaum
PHILIP R. EDELBAUM

COPY RECEIVED

AUG 5 1976
ROBERT B. FISKE JR.
U. S. ATTORNEY
S. DIST. OF N. Y.